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SYMPOSIUM FOREWORD

THE FIRST (AND LAST?) TERM OF THE ROBERTS COURT

Mark Tushnet*

Chief Justice John Roberts arrived at the Supreme Court, he has said, with at least one thing on his mind: reducing the number of divided judgments and increasing the number of unanimous ones.¹ I suggest that he may have arrived there with another “expectation”: that he and the Court he led would be collaborating with a Republican president and Congress for the foreseeable future.² In this Foreword, I examine whether achieving unanimity is desirable, and whether collaboration is likely.

I. UNANIMITY AS A “CONSUMMATION DEVOUTLY TO BE WISHED”³

In an interview with Jeffrey Rosen, conducted after the completion of Chief Justice Roberts’ first term on the Supreme Court, the Chief Justice emphasized his interest in obtaining more unanimous and fewer sharply divided opinions from his colleagues. This would lead, he said, to a “jurisprudence of the Court” rather than “the jurisprudence of the individual.”⁴ The latter, he suggested, “undermine[d] . . . the notion of the rule of law” by “personaliz[ing] it.”⁵ He continued, “I think it’s bad, long-term, if people identify the rule of law with how individual justices vote.”⁶

The Court would benefit from unanimity, the Chief Justice argued, by gaining credibility as the articulator of an impersonal rule of law, and individual justices would thereby benefit as well.⁷ Unpacking this idea is a bit tricky, along two dimensions.

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1. See text accompanying notes 4–6.

2. I use the quotes to indicate that I do not mean to assert that this was a consciously held view. On the concept of a collaborative Court, see Mark Tushnet, *The Supreme Court and the National Political Order. Collaboration and Confrontation*, in *The Supreme Court and American Political Development* (Ronald Kahn & Ken I. Kersch eds. 2006).

3. William Shakespeare, *Hamlet*, Act 3, Scene. 1.

4. Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America* 224 (Henry Holt 2007).

5. *Id.* at 225.

6. *Id.* at 226.

7. *Id.* (“You do have to put people in a situation where they will appreciate, from their own point of view,

First, consider a judge who initially believes in case A that the legal materials, properly analyzed, justify a particular result. The judge then discovers that a majority of her colleagues read the same materials to justify a different result. That discovery might prompt the judge to rethink her analysis of the legal materials. That, however, is not what the Chief Justice has in mind. Rather, his account is one in which the judge suppresses her best judgment of what the legal materials require in the service of the larger goal of enhancing the Court's credibility and legitimacy.

What does a judge gain from doing so? According to the Chief Justice, the possibility that, when the situation is reversed and she is in the majority with someone else thinking about dissenting, that "dissenter" will similarly withhold his best judgment of what the law requires. The suppression of dissent in case A will have enhanced the Court's credibility, with the effect of enhancing its credibility in case B as well.

This mechanism seems problematic. The judge has to think that the benefit of getting the law right in case B exceeds the cost of getting it wrong in case A. My sense is that this will be true if (and perhaps only if) the judge believes that case B is more important than case A. Suppose, though, that the potential dissenter in case B agrees. He will then not recede from his judgment. The mechanism here thus seems to require that judges disagree not only about what the legal materials require in particular cases, but about which cases are the most important ones.⁸ Surely this is sometimes true: one justice may think that preemption cases are really important but tax cases not, another the reverse. But, as a general matter, I think we can expect justices to have broadly similar "importance rankings" of the cases,⁹ especially in the cases likely to attract public attention and therefore to be most influential in generating the rule-of-law legitimacy the Chief Justice seeks.¹⁰

The second difficulty is that it is unclear why credibility as such is desirable from a social point of view. One might think that judicial decisions should be credible because, and to the extent that, they are correct. But, the mechanism I have described *requires* that unanimity be achieved at the cost of correctness from someone's point of view. Perhaps, though, the "point of view" qualification matters. In a pluralistic society, it is quite likely that someone will think that any particular decision is wrong. Perhaps credibility is socially significant because it induces people to comply with judicial rulings they believe erroneous by giving them some small assurance that most of the

having the Court acquire more legitimacy, credibility, that they will benefit from the shared commitment to unanimity in a way that they wouldn't otherwise.".)

8. This "ranking" problem also has some bearing on another problematic aspect of the mechanism I am discussing. That mechanism requires that a justice recede today in the expectation (or hope) that a colleague will recede later. Lacking any device to enforce this implicit deal, the justice can rely only on the development of a norm favoring unanimity. The ranking problem allows the justice's colleague to explain her failure to recede by referring to the "real" norm, which is to recede in cases that the justice regards as relatively unimportant.

9. This seems to me likely to result in part from the discretionary nature of the Court's docket, which allows the justices to make preliminary assessments of importance before granting review. Of course, the "Rule of Four," whereby a minority can force a case on to the Court's plenary docket, reduces the necessity for early agreement on a case's importance.

10. For a possible example, consider the Chief Justice's decision to join the dissent in *Gonzales v. Or.*, 126 S.Ct. 904 (2006), discussed below in Ken Levy, *Gonzalez v. Oregon and Physician-Assisted Suicide: Constitutional, Ethical, and Policy Issues*, 42 *Tulsa L. Rev.* 697 (2007).

courts' decisions are correct. Perhaps the courts resolve cases mostly correctly from the point of view of most people, while acknowledging that some people will think that any particular decision is wrong. Credibility assures the latter that overall the courts are getting things right. This does count as a rule-of-law virtue, but only modestly; much will depend on how many and how large are the courts' errors.

I have described the mechanism the Chief Justice imagines as one in which the potential dissenter simply recedes from her initial judgment. He might have a different process in mind, though. Here the two sides compromise.¹¹ The result, in Chief Justice Roberts's conception, is a narrower decision than either side would like. And, "[i]n most cases, I think the narrower the better because people will be less concerned about it."¹² I am not sure that this is right even on its own terms. The Chief Justice seems to envision a world with two groups: those who are on the losing side, who are less dissatisfied with a narrow loss than they would be with a broad one, and those who are on the winning side, who are satisfied with a narrow victory. Suppose, though, that those on the winning side include a large group who are disappointed by the *failure* to achieve a broad victory. In that situation, overall "people"—that is, netting out everyone's satisfaction and dissatisfaction—would be less concerned about a broad ruling than a narrow one.¹³

More important, though, "concern" is not the only relevant criterion, even from a rule-of-law perspective. Commonly, the rule of law is said to require laws that inform people about the legal consequences of their actions.¹⁴ And it is commonly observed that narrow holdings provide less information than broad ones.¹⁵ Achieving consensus by compromise, then, may increase the Court's legitimacy—and therefore the rule-of-law virtue associated with compliance with judicial rulings—but at the cost of reducing the rule-of-law virtue of information-provision.¹⁶ It is not at all clear why the Chief Justice thinks that the balance in rule-of-law terms lies with increasing compliance with judicial rulings.

Nor is it clear that unanimity achieved by compromise actually could serve the

11. See Rosen, *supra* n. 4, at 227 ("The vote may be divided in conference, and yet if you think it's valuable to have consensus on it, you can get it."), 231 ("You sit around . . . and ask, 'Where's the common ground?'").

12. *Id.* at 228.

13. The satisfaction of those who strongly prefer a broad ruling would exceed the dissatisfaction of the losers and whatever discomfort might be felt by those who would have been satisfied by a narrow ruling. (Those in the last group might not in fact be dissatisfied with a broad ruling although they would have been satisfied with a narrow one.)

14. This is the publicity criterion emphasized by, among others, Lon Fuller. Lon Fuller, *The Morality of Law* (Yale 1965).

15. For an example, see Howard Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 Tulsa L. Rev. 579 (2007) ("while reaching the correct result [unanimously, in *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006)], the Court's narrow opinion failed to establish much-needed prospective rules on the issue,"). Of course we do not know whether unanimity resulted from compromise or simply from unanimous agreement that the narrow result was correct on the merits.

16. A complete analysis is, of course, more complicated. Rules are not intrinsically broad or narrow. For example, a holding that presents itself as narrow can be taken in the future to exemplify some broader principle, and holdings that present themselves as broad can be taken in the future as containing dicta going well beyond what was necessary to dispose of the case at hand. What is at stake, then, is not breadth or narrowness, but the amount of work that future courts and lawyers might find themselves interested in doing to reach the results they think appropriate. All this is familiar from legal realist classics; the modern version is Duncan Kennedy, *Critique of Adjudication: Fin de Siècle* (Harvard U. Press 1997).

legitimacy-promoting interest anyway under the conditions the Chief Justice has created by discussing his desire to achieve unanimity. The reason is that from here on out, when we read unanimous opinions, we have to ask ourselves, “Is it unanimous because the outcome is clearly correct (in which case the decision contributes to the Court’s credibility and legitimacy)? Or it is unanimous because the justices compromised or traded votes across cases (in which case the decision does not add to and might even detract from the Court’s credibility and legitimacy)?” Perhaps credibility and legitimacy are products not of unanimity, but of sincerely achieved unanimity—which means that the Chief Justice’s public comments on his desire to achieve unanimity actually undermine credibility and legitimacy.

In addition, the mechanisms of achieving unanimity I have described fall into the general category of “logrolling” strategies. One persistent question about logrolling is whether it is *socially* beneficial. When logrolling occurs, it clearly benefits the justices who trade votes, by giving the opinion each favors whatever increment of credibility and legitimacy might result from unanimity. And, as I have suggested, one can imagine ways in which a larger number of unanimous decisions enhances the credibility and legitimacy of the Supreme Court as an institution. Consider, though, the legislative parallel. Logrolling generates benefits for senators who get their pet projects approved for their home states. And it might generate benefits for Congress as an institution by greasing the wheels of legislation generally. But the nation as a whole might suffer from excessive spending.¹⁷ Perhaps the nation might suffer as well from “excessive judicial legitimacy,” if, for example, a smoothly functioning Court generated more wrong decisions than could emerge from a fractious Court.

The Chief Justice’s position might be a more limited one than the one I have discussed so far: not more unanimous opinions but fewer dissenting ones.¹⁸ The idea here would be to replace long dissenting opinions with a recorded dissent without opinion or with a short one to this effect: “I disagree with the Court’s interpretation of the term Z in statute M, but because the Court’s holding concerns only that term and this statute, I refrain from elaborating the grounds of my disagreement.”¹⁹ Note, though, that such a practice makes sense from the dissenter’s point of view only if the Court’s holding in fact has no implications beyond the case at hand.²⁰ This might be true

17. For an overview, see Thomas Stratmann, *Logrolling*, in *Perspectives on Public Choice: A Handbook* 322 (Dennis C. Mueller ed. Cambridge U. Press 1996).

18. Concurring opinions present a different problem. At first glance such opinions might seem largely pointless, because they express agreement with the result, and to some significant extent the reasoning, already laid out in the majority opinion. Concurring opinions, though, might be particularly valuable when they do some of the work narrow (or broad) opinions foist off onto the future, by explaining the limits of the majority’s holding or by setting out the deeper principle that underlies that holding. The amount of work a concurring opinion does is of course limited by the fact that it is an interpretation offered by only one or two judges. Further, some concurring opinions might confuse the holding by offering an “interpretation” of the majority’s opinion that is on analysis inconsistent with it.

19. I note here the severe criticism leveled in Bernard Wolfman, *Dissent Without Opinion: The Behavior of Justice William O. Douglas in Federal Tax Cases* (U. Penn. Press 1975), whose subtitle conveys the point. The criticism, though, rests on the *systematic* nature of Justice Douglas’s practice, from which Professor Wolfman inferred an unstated and undefended general anti-government position. In the absence of such a pattern, I doubt that one could fairly argue that a judge who dissented without opinion (unsystematically) was failing to perform her job.

20. And, of course, those directly governed by the holding.

sometimes, but not always. The dissent might describe policy arguments favoring a different interpretation from the majority's, and those arguments might carry weight in congressional deliberations over whether to modify the statute.²¹ Or, a dissenter might note that the same term is used in other statutes and fear that the interpretation will push itself into new territory. By indicating how the term is being misinterpreted in statute M, the dissenter might provide some arguments that can be used when its meaning comes in issue in statute P and the information that at least one judge might support giving the term a different interpretation there.

The Chief Justice's quest for unanimity may succeed if, as he put it to Rosen, he is able to work out the "fascinating personal psychology dynamic to get nine different people with nine different views" to agree.²² Whether the Supreme Court, the law, and the nation would then be better off is, I think, open to question.

II. THE ROBERTS COURT AND THE POLITICAL BRANCHES

Thurgood Marshall took his seat on the Supreme Court in 1967 expecting to be a core member of the Warren Court's liberal majority, working hand in hand not only with his colleagues on the Court but also with the Great Society Democratic Party that controlled the presidency and Congress. It did not turn out that way. Richard Nixon won the next year's presidential election and appointed four new justices in rapid succession. Justice Marshall spent the rest of his career working out his position as a dissenter on the Court and increasingly out of step with the nation's political majority.

Might Chief Justice Roberts (and Justice Alito) have a similar experience?²³ Obviously, the Rehnquist Court had moved constitutional law in a conservative direction. It laid the groundwork for quite substantial changes in propositions of constitutional law that had been accepted for decades, but it had taken only relatively small steps in making such changes.²⁴ Chief Justice Roberts and Justice Alito developed their views on constitutional law within a milieu that encouraged bold thinking about constitutional transformation. It is not hard to believe that they arrived at the Supreme Court expecting to push the Rehnquist Court's doctrines deep into new territory—that is, expecting to accomplish a constitutional transformation on the scale of the one after 1937.²⁵

The New Deal Court was able to transform constitutional law in part because it had Congress and the President on its side. And, in 2005 and early 2006 so did the Roberts Court. Having lost the presidential election in 2004 and losing ground in Congress at the same time, Democrats were in seeming disarray. In 2005 observers might have expected continued Republican control of Congress and the Presidency for the politically

21. This might be especially true if the majority's interpretive approach leads it to avoid making policy arguments at all.

22. Rosen, *supra* n. 4, at 231.

23. Not necessarily by becoming dissenters on the Court, but by becoming out of step with the majorities prevailing in the other branches.

24. I develop this argument in some detail in Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (Norton 2006).

25. For an overheated description of what such a transformation might include, see Martin Garbus, *The Next 25 Years: The New Supreme Court and What It Means for Americans* (Seven Stories Press 2007).

foreseeable future, which means for a large portion of Chief Justice Roberts's expected career. Decades of unified Republican government were a realistic prospect after decades of divided government. And unified government gives the Supreme Court real opportunities to collaborate with the dominant political coalition. It can discipline localities that have managed to hold out against the political changes on the national level,²⁶ or implement aspects of the dominant coalition's political agenda that have low legislative priority.²⁷

The political context within which the Roberts Court was to operate changed with the 2006 congressional elections. Democrats took narrow control of both houses of Congress, and in the aftermath of the election Republican prospects for retaining the presidency in the 2008 elections seemed to drop substantially. Rather than dealing with political branches with which it could collaborate, the Roberts Court—at least in the short run, and possibly longer—faced divided government and the possibility of unified Democratic government.

What paths are open for the Roberts Court under these circumstances? Consider first divided government with an energized Democratic Party controlling Congress, albeit narrowly, and a dispirited Republican Party holding the presidency. As a purely formal matter, the Roberts Court could do pretty much anything it wanted. It could vigorously pursue the constitutional transformation, knowing that the Democratic Congress might not even be able to enact statutory responses, much less constitutional ones, and that any statutory responses would face a nearly inevitable and sustainable presidential veto.²⁸

Pursuing that course might not be prudent, though. It would simply give Democrats ammunition to use in their congressional and presidential campaigns: "If you disagree with the Roberts Court—or, more likely, if you think that the statutes we have on the books are generally pretty decent ones—you have to elect us, and in even greater numbers, so that we can respond with statutes and new nominees more to your liking." Prudence then might suggest continuing in the Rehnquist Court tradition: small moves in a generally conservative direction, but nothing to accomplish, or even signal the possibility of, dramatic constitutional change.²⁹ It is in this sense that Chief Justice Roberts's first term might have been the last one in which a conservative Roberts Court had a chance to establish itself.

The same course might initially seem sensible were the Roberts Court to face a

26. On this interpretation, one might see *Gonzales v. Oregon*, 126 S.Ct. 904 (2006), as having arisen "too soon," that is, before unified Republican control of the national government became fully consolidated.

27. This is my description in abstract terms of how the Warren Court collaborated with the Great Society Democratic Party. For more detail, see Tushnet, "*The Supreme Court and the National Political Order*," *supra* note 2.

28. The situation would be different were Democrats to achieve veto-proof margins in both houses, which would also put them in apposition to propose constitutional amendments for submission to the states. Were that to occur, though, I suspect that we would have already experienced a substantial upheaval in politics. If so, over the period during which that upheaval occurred, conservative justices might well have been replaced by Democratic nominees, and the prospect of transformative rulings would have disappeared.

29. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), might be understood in these terms, albeit with some pulling and hauling. an endorsement of the power of the national government taken as a whole at a time of unified Republican government, coupled with a refusal to endorse the strongest versions of presidential power urged on the Court.

unified Democratic government in the political branches. The risk of legislative repudiation of more substantial moves would be even greater, because the possibility of a veto supporting the Roberts Court's position would have disappeared.

Unified Democratic government presents a different problem for the Roberts Court's conservatives, though, in connection with the politics of judicial nominations. With divided government and a Republican president, nominees to the Supreme Court are chosen by a Republican. The range of choice would be constrained by the need to secure confirmation from the Senate. In a Senate controlled by Republicans, a Democratic-led filibuster of Justice Alito's nomination failed, and his confirmation was opposed by forty-two Democrats. I think we can reasonably expect that a Senate controlled by Democrats would not confirm a nominee perceived to be in the Alito-Thomas-Scalia mold, and perhaps not even someone with Chief Justice Roberts's background in conservative legal circles. From the perspective of one interested in accomplishing a constitutional transformation, that is the best that can be expected under divided government. And, from that perspective, the prospects under unified Democratic government are of course even worse.

This suggests that the best strategy is to "shoot the moon"³⁰—that is, to seize whatever opportunities present themselves to push the constitutional transformation forward. Indeed, one might think that, facing unified government, there is no downside to shooting the moon. You might succeed, by getting your constitutional interpretations to stick immediately or, perhaps less likely but possible, by influencing electoral outcomes in the direction you favor (mobilizing Republicans to defend conservative constitutional rulings, for example). Of course, you might fail immediately, provoking a constitutional crisis right away. And the crisis might be resolved against you. But, after all, your long-term prospects are quite unfavorable. With each retirement from the Supreme Court, the possibility of constitutional transformation diminishes: New justices nominated by a Democratic president and confirmed by a Democratic Senate are hardly likely to join you in your transformational project.

There is a fair amount of evidence that justices think strategically "in the small." Sometimes a justice will vote to deny review in cases where he or she thinks that the lower court's decision was important and mistaken, but is not confident that four other justices would agree with them.³¹ Justices also sometimes draft opinions strategically, suppressing their own best judgments about what the law requires to ensure an outcome that is at least better than the available alternatives.³² And, I believe that some justices probably do think strategically about reshaping the law in particular doctrinal domains.³³

30. The term comes from the card game Hearts, where it refers to a strategy of seeking to win all the hearts and the queen of spades. It is a high-risk strategy, but if it succeeds it gives the player the largest possible gain against her opponents.

31. See H.W. Perry, *Deciding to Decide. Agenda Setting in the United States Supreme Court* 198–207 (1991) (describing "defensive denials").

32. For a general discussion of strategic opinion-drafting, see Lee Epstein & Jack Knight, *The Choices Justices Make* (CQ Press 1998); James Spriggs *et al.*, *Bargaining on the U.S. Supreme Court. Justices' Responses to Majority Opinion Drafts*, 61 J. Pol. 485 (1999).

33. For a suggestion that this might be true of the Court's "federalism revolution," see Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 St. Louis U. L. Rev. 569 (2003).

Strategic thinking in the large, of the sort I have described, is quite another thing. And I doubt that any justice ever consciously strategizes about achieving long-term goals in relation to the rest of the political system. How then might the Court's position be coordinated with those in the political branches? I suggest—to return to a theme touched on by Professor Rosen—that the answer lies in judicial character or temperament. Consider first the “shoot the moon” strategy. What kind of judge might make decisions whose effect is to shoot the moon even if the judge does not consciously pursue that strategy? Perhaps one strongly committed to a comprehensive vision of the Constitution's meaning. That vision provides an answer to every interpretive question that comes before the Court, and the judge's strong commitment to it makes giving any other answer unthinkable, indeed perhaps even a violation of the judge's oath of office. In contrast, prudence may play a larger role in the thinking of a judge who sees his or her role as resolving the conflicts underlying the Court's cases and mediating between divergent positions held by the judge's colleagues. One might even think that this judge would come to hold a view of constitutional law consistent with the judge's temperament—is, that the substance of constitutional law itself mediates the conflicts between *other* (mistaken) constitutional visions.

Chief Justice Roberts' interest in achieving unanimity might suggest that his temperament is of the latter sort. Except for this: Revealing that one is interested in achieving unanimity as such might be a self-defeating strategy. It introduces into every case a question about the Chief Justice's position: Is it the result of his independent consideration of the merits, or strategically chosen to achieve unanimity, or—if the Chief Justice is in the minority—why is he failing to act so as to achieve unanimity? Better, I would think, to win over your colleagues by arguing with them on the merits, by being charming, by acting, as political scientist David Danelski long ago argued, as the Court's social leader as well as its task leader.³⁴

III. CONCLUSION

A Supreme Court justice's first Term—indeed, the justice's first few Terms—are ones in which the justice is getting accustomed to a new job, different from anything the judge has done before. That goes in spades for a new Chief Justice. No one should infer too much about “the Roberts Court” from Chief Justice Roberts's first Term. That is particularly true when, as might be the case, the political environment in which the Court operates is itself changing, perhaps dramatically. The articles in this Symposium provide some hints about what the Roberts Court is and might be, but no more than hints. Still, in an information-poor environment, perhaps hints are all one can hope for. And, of course, the articles are intrinsically interesting in what they have to say about election law, the Fourth Amendment, and more. I suspect that, in the long run, their substantive contributions will matter more than my speculations in this Foreword. Which suggests that readers should turn the page quickly.

34. David J. Danelski, *The Influence of the Chief Justice in the Decisional Process*, in *Courts, Judges, and Politics* 497 (Walter Murphy and C. Herman Pritchett eds. McGraw Hill 1961).

UPDATE

This Foreword was completed before the conclusion of the 2006-07 Supreme Court Term. That Term saw a far larger number of sharply divided decisions in cases that attracted a great deal of public attention. Chief Justice Roberts's stated goal of reducing dissent seemed to elude him.³⁵ What many observers characterized as the Court's rapid movement to the right might be taken as confirming my suggestion that the Court's conservatives might be pursuing the "shoot the moon" strategy.

As I noted in the Foreword, though, we should not draw strong inferences from decisions over the course of one or two Terms. Three cases were taken to indicate the Court's movement: the integration cases,³⁶ the campaign finance case,³⁷ and the abortion case.³⁸ What is notable about these cases is that they are the "low-hanging fruit" left over from Justice O'Connor's retirement. That is, they deal with the three most highly-charged issues on which Justice O'Connor and Justice Kennedy divided. They involved issues about which Justice Kennedy cares a great deal, and therefore issues as to which the pull of stare decisis would be weakest for him. I wonder whether there are many other cases rattling around out there that are similarly low-hanging fruit for the new majority on the Roberts Court.

Perhaps that Court will continue to shoot the moon, taking advantage of what its majority sees as a perhaps temporary condition. Or perhaps it will pursue a more prudent course, moving to the right, certainly, but neither rapidly nor dramatically. Whether such a strategy will achieve a consolidation of a conservative vision of constitutional law remains open to question.

35. And, indeed, the tone of those portions of the Chief Justice's opinion in *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, ___ S. Ct. ___ (2007) [§ IV], dealing with the dissenters' views does not suggest authorship by a person seeking to damp down expressed disagreement.

36. *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, ___ S. Ct. ___ (2007).

37. *Federal Elections Commn v. Wis. Right to Life*, ___ S. Ct. ___ (2007).

38. *Gonzales v. Carhart*, ___ S. Ct. ___ (2007).
